(19)

Supreme Court of the United States

OCTOBER TERM, 1942

No. 596

GALBAN LOBO COMPANY, S. A.

Petitioner,

—*vs.*—

LEON HENDERSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BAER & MARKS,
Attorneys for Petitioner.

DONALD MARKS,
JULIUS B. BAER,
Of Counsel.

Law Brief Press—NYC

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The above named petitioner, by the undersigned, its attorneys, respectfully prays that a Writ of Certiorari to the United States Emergency Court of Appeals may issue to review the judgment of that Court made on the 19th day of November, 1942, in the above mentioned cause.

Statement of Proceedings in Court Below.

This cause arose under the provisions of Sections 203 and 204 of The Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress, Second Session, approved January 30, 1942). Petitioner on June 1st, 1942 filed with the Office of Price Administration a petition protesting against an interpretation of Revised Price Schedule No. 16 as applied to the facts of the case, and requesting permission to collect the contract price from the buyer. The protest

was filed pursuant to Section 203 (a) of The Emergency Price Control Act (Tr. 1-20*). On July 1, 1942, the Price Administrator issued an order dismissing said petition and protest because it was not filed within sixty days of the date when the grounds for protest arose (Tr. 21, 22).

Petitioner thereafter filed its complaint against the Price Administrator in the United States Emergency Court of Appeals protesting said order of dismissal. On November 19, 1942, the United States Emergency Court of Appeals rendered its decision dismissing petitioner's complaint, holding that Complainant's grounds of protest arose on March 16, 1942 and that its petition filed on June 1, 1942 was rightly dismissed by the Price Administrator as out of time under Section 203 (a) of the Act.

Statement of Opinion Below.

The opinion of the United States Emergency Court of Appeals is not yet officially reported. A copy thereof is set forth at length in the Record.

Jurisdiction.

The judgment of the United States Emergency Court of Appeals was entered on November 19, 1942. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942.

Summary Statement of Matter Involved.

On February 28, 1942, petitioner entered into a contract with the American Sugar Refining Company for the sale of 12,205 bags of Cuban Centrifugal Sugar, crop of 1941, at 2.65¢ per pound F. A. S. Puerta Tarafa, Cuba. The contract price was the Cuban equivalent at that time of the maximum price of 3.74¢ per pound "duty paid cost and

* References to Transcript pages are to the original page numbers of the Transcript of proceedings before the Price Administrator.

freight basis" New York established by Revised Price Schedule No. 16 effective February 11, 1942. The contract provided that the sugar should be shipped per "S. S. YILDUM", "expected to commence loading about March 13th to March 16th, 1942, to New York, Philadelphia, or Baltimore." The "S. S. YILDUM" was delayed and did not arrive at Puerta Tarafa for loading until the latter part of March. She was loaded on March 30th and sailed April 4, 1942.

The "S. S. YILDUM" was under charter to American Sugar Refining Company and petitioner had nothing to do with the payment of freight, nor was it concerned with the movement of the sugar after its delivery at ship's side. Such a contract was not contrary to the terms of Revised Price Schedule 16, and the Court below tacitly assumes that F. A. S. terms were permissible. This was necessarily so in view of the injunction of the Statute (Sec. 2 h) that the "business practices" of an industry should not be changed by the Price Administrator.

On March 12th, the War Shipping Administration issued Rate Order No. 12 effective March 16th which authorized a 22% surcharge on ocean freight rates for transporting sugar from Cuba to United States Atlantic and Gulf ports.

On or about April 9, 1942 the Refining Company refused to pay the contract price of 2.65¢ per pound on the ground that Revised Price Schedule No. 16 required a reduction of the F. A. S. price by an amount equal to the 22% freight surcharge authorized by the War Shipping Administration.

This surcharge was absorbed by the Defense Supplies Corporation on shipments of 1942 crop sugar. Application was made to that agency for similar treatment of the "YILDUM" shipment, but the request was denied as to 1941 crop sugar.

On April 22nd, petitioner and the Refining Company jointly addressed a letter to the Office of Price Administration asking whether, without violating Revised Price Schedule

No. 16, the Refining Company might pay petitioner 2.65¢ per pound for the sugar. On May 4th the Office of Price Administration replied by letter stating that the contract price would have to be reduced by an amount equivalent to the 22% surcharge in order to comply with Revised Price Schedule No. 16. On June 1st, petitioner filed its protest against this interpretation and application of the provisions of the Price Schedule. The protest was dismissed on July 1st and petitioner's complaint was filed in the Emergency Court of Appeals within thirty days thereafter.

The 22% surcharge on freight was billed to the Refining Company, the charterer of the "S. S. YILDUM". It does not appear what the charter of the ship cost the Refining Company, nor what the net effect of the 22% surcharge was on the cost of transporting this particular sugar to destination. The Refining Company claimed, however, that the contract price should be reduced by the amount of the surcharge on the normal freight rate from the port of origin to New York.

The reduction of the F. A. S. price required by the ruling of the Price Administrator of May 4, 1942 amounted to .0748¢ per pound, resulting in a payment by the Refining Company of 2.5752¢ per pound instead of 2.65¢ per pound, or $3017.66 less than the contract price.

Principal Questions Presented.

1. Did the sole grounds for petitioner's protest arise on March 16, 1942 when the surcharge on freight ordered by the War Shipping Administration became effective?

2. Was the dismissal of the protest and the failure of the Price Administrator to grant petitioner a hearing of its protest on the merits a denial of due process of law under the Fifth Amendment of the Constitution of the United States?

3. Did the United States Emergency Court of Appeals properly dismiss the complaint in this case?

Statute, Orders and Schedules Involved.

The pertinent Statute, Rate Order No. 12 of the War Shipping Administration, and Amendment No. 11 to Price Schedule No. 58 will be found in the Appendix (pp. 19-22). The pertinent order dismissing petitioner's Protest, and Revised Price Schedule No. 16 will be found in the Record (Tr. pp. 21 to 29).

Reasons for Granting Writ of Certiorari.

The Court below has held that the mandate of the Price Schedule was so clear and unambiguous that on March 16, 1942 petitioner must have known that the order of the War Shipping Administration affected its contract with the Refining Company. This ignores the realities and leads to an inequitable and unnecessarily harsh result.

On March 16, 1942 the contract between petitioner and the Refining Company was an open commitment, as the "YILDUM" had not yet arrived at Puerta Tarafa. As of that date, the parties could not know whether the "YILDUM" would arrive within the next sixty days. According to the Court below, petitioner had only sixty days from March 16th within which to file protest. But it is a fundamental rule that a statute of limitations begins to run only when the claimant has a matured cause of action for which a remedy may be sought in a proper tribunal. Here petitioner did not have a matured basis of protest on March 16, and could not have stated in a petition to the Office of Price Administration what effect if any the surcharge order might have on the then open contract. Hence that date did not mark the beginning of its period of limitation. The Court below rested its decision on the finding that petitioner

should have known on March 16 that its open contract would be affected by the surcharge order, and that it was therefore chargeable with the duty to protest, beginning on that date. Even from this point of view the ruling is erroneous.

Can it be said that on that date a reasonable man should have understood that his time to protest had begun to run? To come to such a conclusion a man must have assumed (1) that the vessel will arrive and sail while the surcharge is in effect; (2) that the surcharge will apply to the shipment regardless of the terms of the charter party held by the buyer; (3) that the surcharge will not be absorbed by the Defense Supplies Corporation; and (4) that an F. A. S. contract, permissible and valid when made, may constitutionally be invalidated by a subsequent extrinsic event.

These are all assumptions that do not depend upon the wording or clarity of the Price Schedule. Despite its unambiguity as construed by the Court below, petitioner could not anticipate the effect of the surcharge order upon this contract. There was nothing to protest until that effect became apparent. This took place not earlier than the date of the refusal of the Refining Company to pay the contract price; or, in the alternative, as urged by petitioner, on the date when the Price Administrator ruled in response to a joint inquiry that the contract price must be reduced. In either case, petitioner was within the short statute of limitations fixed by the law.

Such a short statute of limitations should be applied with fairness and with consideration of the practical point of view of the business man affected. In addition to the harshness of the result reached by the Court below, a serious constitutional question is presented. An F. A. S. contract by its terms places upon the buyer all risks of increased transportation costs after delivery at ship's side. The Court below has assumed that such a contract was valid under the Price Schedule. If it was, petitioner had the

right on March 16th to assume that its terms were not impaired by the surcharge order of the War Shipping Administration. The result below, however, is based upon the premise that the F. A. S. terms were affected by the surcharge order, and that petitioner should have assumed that legal result on March 16th. There is no constitutional basis for the conclusion that a contract permissible and valid when made can be so invalidated by a subsequent extrinsic event.

Although petitioner raised this constitutional question below, the Court did not pass upon it in its opinion. The premise of the Court below is of grave constitutional import. This question should, therefore, be reviewed by this Court.

CONCLUSION.

For the reasons indicated above, as elaborated in the brief annexed hereto, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Emergency Court of Appeals to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Emergency Court of Appeals may be reversed, and that your petitioner may have such further and other relief as this Court may deem proper in the premises.

Respectfully submitted,

BAER & MARKS
Attorneys for Petitioner.

By: DONALD MARKS

Dated, New York, N. Y., December 14, 1942.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DONALD MARKS, being duly sworn, deposes and says: That he is a member of the firm of Baer & Marks, maintaining offices at 20 Exchange Place, Borough of Manhattan, City and State of New York; that he is a member of the bar of the Supreme Court of the United States and is an attorney for Galban Lobo Company, S. A., which was the plaintiff in the proceeding before the United States Emergency Court of Appeals in the above entitled matter; that he makes this verification on behalf of Galban Lobo Company, S. A. as petitioner herein; that affiant has read the foregoing petition, as the attorney for said plaintiff Galban Lobo Company, S. A. and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well founded and entitled to a favorable consideration of this Court and that it is not interposed for the purpose of delay.

DONALD MARKS

Subscribed and sworn to before me
this 14th day of December, 1942.

ROSE HOFFMAN
Notary Public, Kings County
Kings Co. Clk's No. 402 Reg. No. 3106
N. Y. Co. Clk's No. 317 Reg. No. 3H214
Commission Expires March 30, 1943

Supreme Court of the United States

OCTOBER TERM, 1942

No.

GALBAN LOBO COMPANY, S. A.

Petitioner,

—*vs.*—

LEON HENDERSON, Price Administrator,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONER GALBAN LOBO COMPANY, S. A.

Specification of Errors To Be Urged.

It is submitted that the United States Emergency Court of Appeals erred:

1. In holding that the grounds for petitioner's protest arose on March 16th, 1942 when the order of the War Shipping Administration imposing a surcharge on freight became effective.

2. In holding that the action of the Price Administrator in dismissing petitioner's protest on the ground that it had not been filed within the period required by the Statute was correct.

3. In failing to pass upon the constitutional question urged by petitioner.

4. In dismissing the complaint on jurisdictional grounds.

Chronological Statement.

The chronology, which is pertinent in this case, is as follows:

Revised Price Schedule 16 effective February 11, 1942.

Contract made February 28, 1942.

Delivery contracted for March 12th-16th, 1942.

War Shipping Administration Surcharge Order dated March 12th, 1942, effective March 16, 1942.

Vessel loaded March 30th-April 4th, 1942.

Buyer refused to pay contract price April 9, 1942.

Application made to Defense Supplies Corporation to absorb surcharge April 10-20, 1942.

Joint letter of inquiry addressed to OPA by seller and buyer April 22, 1942.

Reply by OPA advising that reduction in contract price would be necessary, May 4, 1942.

Protest filed with OPA June 1, 1942.

Protest dismissed by OPA July 1, 1942.

Complaint filed with Emergency Court of Appeals July 25, 1942.

AUTHORITIES AND ARGUMENT

I.

Petitioner's protest was filed within sixty days of the date when grounds therefor arose.

The Price Administrator and the Court below have taken the position that the grounds for protest arose on March 16, 1942, when the order of the War Shipping Administration imposing a surcharge on freight became effective.

The Court below said that Revised Price Schedule No. 16 plainly prohibits a purchaser of raw cane sugars from paying for "cost, freight and duty combined" more than the maximum price, and that it was obvious when the order of the War Shipping Administration became effective that the FAS contract price would have to be reduced by an equivalent amount. The Court reached this conclusion because of the declaration of the Price Schedule that its mandate was to be observed "regardless of the terms of any contract of sale or purchase." The Court said that petitioner "was bound to take notice" of this declaration of the Price Schedule.

On March 16, 1942, petitioner did not know whether the surcharge order would affect its contract with American or not. If the vessel had not arrived at Puerta Tarafa until after May 15th, there could have been no basis for protest within the 60 day period fixed by the Court below.

Until American refused to pay the contract price, petitioner could not tell that the 22% surcharge would bring the total landed cost of the sugar above the ceiling price. The vessel was chartered to American, and even with the 22% surcharge the landed cost might not have exceeded 3.74¢ per pound.

Even if the added cost had been known and the vessel's

arrival had been certain on March 16th, petitioner did not know that its contract would be affected. The Defense Supplies Corporation had undertaken to absorb the added cost on 1942 crop sugars. Until the request for similar treatment of these sugars was denied it was not known that Defense Supplies Corporation would not do the same for 1941 sugars. If it had granted such application there would have been no basis for protest by petitioner.

When the proper point was reached petitioner and American faced the issue; and not until then could it be said that grounds for protest existed or that a statute of limitations had commenced to run.

Then the parties to the contract were of the opinion that the appropriate course was to present the issue to OPA. From a practical point of view, this seemed to be the sensible and natural action to be taken. It was not regarded as necessary to file a protest before obtaining a ruling from OPA.

Prompt action was taken by both parties to the contract to procure OPA's views. When OPA ruled on the question, petitioner then took timely action to file its protest.

That protest was filed within sixty days of the refusal of the buyer to pay the contract price as well as within sixty days of the date of OPA's ruling. Thus, whichever date might be taken as beginning the running of the statute of limitations, petitioner's protest was timely.

The Court below conceded that "an interpretation resolving an ambiguous provision of a price schedule or regulation might constitute a new ground for protest". It held, however, that the provisions of Revised Price Schedule No. 16 "unambiguously required the application of the War Shipping Administration's freight rate increase to the complainant's sale of sugar to the extent of reducing by the amount of that increase the F. A. S. price which it was entitled to receive for the sugar sold."

To say that the effect of the Price Schedule was unambiguous as of March 16th, 1942 is to impute to the parties affected an understanding of the Statute and Price Schedule and a prevision of the reasoning of the Court that could not possibly be expected either of lawyer or business man. The Court's reasoning begs the question. The issue is not whether the effect of the Price Schedule is unambiguous in the light of the Court's decision; it is whether it was unambiguous as of March 16th, 1942. At that time without the guidance of decision or administrative ruling, both business man and lawyer could be excused for entertaining doubts on the subject.

Petitioner has been refused a hearing on the merits. The Price Administrator has given no consideration to its plea that upon the facts of this case, an exception should be granted permitting the contract to be performed. No question of principle is involved; no conflict with the purposes of price control is presented. The only question is whether the additional expense of the 22% surcharge shall be borne by the buyer (to whom it was billed) or shall be thrown back upon the seller in violation of the terms of the contract itself.

The Price Administrator has recognized the merit of the position taken in this brief in a ruling made in a similar situation relating to wool top futures contracts. Amendment No. 11 to Price Schedule No. 58 effective December 12, 1942 provides that all contracts made after December 10, 1941 may be carried out at the original price so long as that price was not higher than the maximum permitted by Price Schedule No. 58 on the contract date. This amendment became necessary because of the provision for upward and downward revision of the price ceiling in the light of changes in War Risk Insurance rates, promulgated by the War Shipping Administration on wool imported from Aus-

tralia to the East Coast. In announcing Amendment No. 11, OPA made the following statement:

> "The necessity for this amendment is apparent. If it were otherwise, a person could not enter into a futures selling contract for wool tops with the assurance that when the settlement date arrived, he would be able to close his contract at a price at which it was entered into.
>
> "Fluctuations in war risk insurance rates should not have the effect of destroying the contractual certainty that is essential in the orderly operations of a futures market."

The certainty which is essential in the orderly operation of a futures market is no less essential in dealings between producers and importers of sugar. The considerations which led to the adoption of Amendment No. 11 to Price Schedule No. 58 should have led with equal force to the granting of petitioner's plea for relief in this case.

In fairness to petitioner, the Statute should not be construed, under such circumstances, so as to cut off its right of protest sixty days after the imposition of the surcharge. As the law reads there was no compelling need so to construe it.

At the outset of the administration of the law, this case arises as a challenge. The Price Administrator and the Emergency Court of Appeals have adopted a legalistic and technical construction of the law. This Court alone may now take the realistic view and in doing so give assurance that the law will be administered practically and reasonably.

II.

Plaintiff has been deprived of its property without due process of law in violation of the Fifth Amendment of the Constitution.

In the Court below, petitioner urged that the action of the Price Administrator in dismissing its protest was a denial of due process under the Fifth Amendment. That argument was not passed upon by the Court in its decision.

Petitioner sought a hearing by the Price Administrator in order to argue, among other things, that neither the law nor the Price Schedule should be so construed as to render a contract, which was lawful under the Price Schedule when made, subject to impairment through the force of such a subsequent extrinsic event as the order of the War Shipping Administration.

This is not to say that Congress might not constitutionally empower the Price Administrator to invalidate existing contracts in the establishment of price schedules. The Emergency Price Control Act in Section 4 (a) specifically provides that:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * in violation of any regulation or order under Section 2 * * * ."

For the purpose of this case, it may be accepted that Congress has remained within constitutional limits in thus impairing existing contracts.

It does not follow, however, that Congress has authorized or may authorize the Price Administrator to formulate price schedules or regulations in such fashion as to subject con-

tracts made in reliance thereon to the hazards of subsequent events.

The Price Administrator is enjoined in Section 2 (h) of the Act to exercise his powers in such manner as not "to operate to compel changes in the business practices, * * * established in any industry * * * *".

In Price Schedule 16, the Administrator has established maximum prices for raw sugar on a "duty paid, cost and freight basis". The trade has customarily purchased raw sugar on that basis; but it has likewise customarily purchased raw sugar on an F. A. S. or F. O. B. shipping point basis. It has been tacitly assumed by the Court below (and conceded by the Price Administrator in his brief below) that F. A. S. and F. O. B. contracts are permissible and valid under the Price Schedule. Nevertheless, the Court has held that F. A. S. or F. O. B. contracts, valid when made, may be invalidated by a subsequent change in the cost of transportation.

The Statute does not give the Price Administrator the authority so to construe the Price Schedule. Furthermore, such construction of the Price Schedule deprives petitioner of the benefits of a contract which was valid under the Price Schedule when made and, therefore, deprives petitioner of its property without due process of law.

The Court below reasoned that petitioner made its contract with knowledge of the declaration of the Price Schedule that its mandate was to be observed "regardless of the terms of any contract of sale or purchase" and that, therefore, it was obvious on March 16th that its F. A. S. contract price would have to be reduced. In the first place, the quoted portion of the Price Schedule may quite properly be limited in its application to those contracts which were in existence at the date of adoption of the Price Schedule, In the second place, if the F. A. S. contract was a binding

and valid commitment under the terms of the Price Schedule, it was not obvious that its terms were changed by the surcharge order of the War Shipping Administration.

Upon such reasoning, petitioner's contract was no contract at all. It was subject to impairment by any incident which might increase the buyer's cost of transportation. If the crew of the "S. S. YILDUM" had refused to proceed from Puerta Tarafa to New York because of the submarine menace unless the charterer of the vessel should pay them a bonus, such increase in the cost of transportation, according to the Court's reasoning, would impair petitioner's contract by requiring the reduction of the F. A. S. price.

The Court below said: "it is the total cost to the purchaser rather than the portion of that cost which is attributable to the seller which is of crucial importance." The Court erred in this assumption. The Price Schedule does not undertake to fix a ceiling on the cost of raw sugar to the refiner. It fixes a ceiling on the selling price. Any number of additional elements of cost to the refiner may enter into the picture. It is wholly improper to subject the seller of the sugar to the risk of increases in any of such costs.

If sellers are subject to such risks, it would follow that the lowering of freight rates after the making of an F. A. S. contract would be grounds for an increase of the F. A. S. price. Certainly the rights of the seller against the buyer should be no less than those of the buyer against the seller under the provisions of the Price Schedule. Yet such a construction would be obviously improper, as it would destroy the basic terms of F. A. S. and F. O. B. contracts.

Unless the Constitution carries a guarantee against such impairment of contract the business community must face the reality that its contracts are not binding commitments under present price control measures. No one can know whether the contract price will be affected by some extrinsic event before delivery of the merchandise. No man may estimate the risks which his apparent contracts entail.

Such a revolutionary effect upon the business community is not essential to the price control program and was not intended by Congress. Yet that is the effect of the decision below. The premise upon which that decision rests should not be permitted to stand.

CONCLUSION.

Petitioner should be granted a hearing before the Administrator on the merits of its claim that its F. A. S. contract was not invalidated by the order of the War Shipping Administration and that it should be in any case permitted to collect the contract price from the buyer. On the facts of this case, the determination that petitioner's time for filing its protest commenced to run on March 16, 1942 involves an untenable construction of the Statute and an erroneous application of the Statute to the facts of this case. The result is to deprive petitioner of its property without due process of law. On these considerations, it is respectfully submitted that the judgment of the Court below was erroneous and it is, therefore, respectfully submitted that a writ of certiorari to said Court should be granted herein.

Respectfully submitted,

BAER & MARKS
Attorneys for Petitioner.

By DONALD MARKS

Dated: New York, N. Y., December 14th, 1942.

Of Counsel:

DONALD MARKS,
JULIUS B. BAER.

APPENDIX

PERTINENT EXCERPTS FROM STATUTE, ORDER AND SCHEDULE

STATUTE:

Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress, Second Session, approved January 30, 1942):

"Sec. 2 (h). The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this act."

"Procedure—Sec. 203 (a). Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any person subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days * * *."

"Review—Sec. 204 (a). Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * *"

ORDER:

Rate Order No. 12 of War Shipping Administration.

"SURCHARGE—SUGAR FROM CUBA TO UNITED STATES ATLANTIC AND GULF PORTS

Pursuant to the Act of Congress approved July 14, 1941, and General Order No. 3 of February 10, 1942, the following surcharge is hereby prescribed as the maximum in which the Administration will concur as a condition to the granting, or to the continued recognition, of warrants authorized by that Act, all previous Rate Orders inconsistent herewith being amended accordingly:

In the trade from Cuban ports to United States Atlantic and Gulf ports for the carriage of sugar, a surcharge of 22% applicable, on charter terms and conditions, to vessels tendered for loading in Cuba on and after March 16, 1942, and to be applied on existing charter rates as shown in the General Order No. 47 of the United States Maritime Commission, also applicable on berth terms, to vessels loading in Cuba on and after March 16, 1942, and to be applied on existing berth rates."

SCHEDULE:

Amendment No. 11 to Price Schedule No. 58 issued December 7, 1942:

"WOOL AND WOOL TOPS AND YARNS

A statement of the considerations involved in the issuance of this amendment has been issued simultaneously herewith and has been filed with the Division of the Federal Register.†

Section 1410.51 (e) is hereby amended by adding to the proviso at the end thereof the following:

Sec. 1410.51 Maximum prices for wool and wool tops and yarns. * * *

(e) * * *

(4) * * *

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† "The necessity for this amendment is apparent. If it were otherwise, a person could not enter into a futures selling contract for wool tops with the assurance that when the settlement date arrived, he would be able to close his contract at the price at which it was entered into.

"Fluctuations in war risk insurance rates should not have the effect of destroying the contractual certainty that is an essential in the orderly operations of a futures market."

Provided further, That wool top futures contracts entered into after December 18, 1941 at a price no higher than the maximum price determined in accordance with this Revised Price Schedule No. 58, as amended, on the date such contract was made may be carried out at the contract price.

Sec. 1410.60 Effective dates of amendments. (m) Amendment No. 11 (Sec. 1410.51 (e)) to Revised Price Schedule No. 58, as amended, shall become effective December 12, 1942."

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 596

GALBAN LOBO CO., S. A., PETITIONER

v.

LEON HENDERSON, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 43–46) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered November 19, 1942 (R. 47). The petition for a writ of certiorari was filed December 19, 1942. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (herein sometimes termed "the Act").

QUESTION PRESENTED

Whether petitioner's grounds for protest arose on March 16, 1942, and the protest was therefore

properly dismissed by the Price Administrator under Section 203 (a) of the Act as not having been filed within sixty days thereafter.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix.

STATEMENT

On February 11, 1942, Revised Price Schedule No. 16—Raw Cane Sugar (R. 33–39) became effective under Section 206 of the Emergency Price Control Act of 1942. The price schedule prescribed a maximum price for raw cane sugars from offshore producing areas landed at Philadelphia, of 3.74 cents per pound "duty paid cost and freight basis" (R. 35–36).

On February 28, petitioner, a Cuban corporation, entered into a contract to sell certain sugar to The American Sugar Refining Company (herein called American) at 2.65 cents per pound F. A. S.[1] Puerto Tarafa, Cuba (R. 19). The contract price was at that time the Cuban equivalent of the maximum price—i. e., 3.74 cents per pound less duty and the current freight rate to Philadelphia (R. 14).

[1] The expression "F. A. S." is the abbreviation for "free alongside," which is understood to mean that the seller will deliver the cargo alongside the boat and that responsibility and cost of transportation thereafter will be borne by the buyer. 1 Williston, *Sales* (2d ed. 1924) p. 620.

On March 12, the War Shipping Administration issued its Rate Order No. 12, effective March 16, which authorized a 22-percent increase, called a surcharge, in the freight rates for transporting raw sugar from Cuba to United States Atlantic and Gulf ports (R. 15).

On March 30, the sugar in question was loaded on the S. S. *Yildum* and was landed in due course at Philadelphia (R. 21, 25).

Allegedly on April 9, American refused [2] to pay petitioner more than 3.74 cents per pound, less duty and total freight expense including the 22-percent increase (R. 3).

On April 22, petitioner's New York agent and American jointly addressed a letter to the Office of Price Administration asking whether, without violating Revised Price Schedule No. 16, American could pay petitioner the full contract price for the sugar (R. 21).

On May 4, an assistant general counsel of the Office of Price Administration replied that total freight, including the surcharge, must be employed in computing the maximum price, and that American could not pay the maximum price of 3.74 cents per pound, duty paid cost and freight basis, plus the 22-percent freight increase (R. 23).

On June 1, petitioner filed with the Price Ad-

[2] This date and the refusal were not mentioned in the protest and appeared for the first time in petitioner's complaint filed with the United States Emergency Court of Appeals.

ministrator a protest against the provisions of Revised Price Schedule No. 16 (R. 11–30).

On July 1 the Administrator found that the grounds for protest arose on or before March 16, and dismissed the protest on the ground that it had not been filed within the period prescribed by Section 203 (a) of the Act (R. 31). A complaint was thereupon filed with the United States Emergency Court of Appeals, praying that the order of dismissal be set aside (R. 1–7). The court dismissed the complaint, holding that petitioner's grounds for protest arose on March 16, more than 60 days prior to the filing of the protest, and consequently that the protest was rightly dismissed by the Price Administrator (R. 43–46).

ARGUMENT

The question presented by this case is narrow and does not call for review by this Court. Both parties are agreed that under Section 203 (a) of the Act a protest against a price schedule may be filed only within sixty days after its effective date or, if based upon grounds arising after its effective date, within sixty days after the new grounds arose.[3]

[3] As indicated in the opinion below, Section 203 (a), construed literally, admits of a more strict rule with respect to protests based upon new grounds arising within the initial sixty-day period following the effective date of a price schedule. This question of construction, however, does not arise here since the Price Administrator concurs in the more liberal construction urged by petitioner, and the court below accepted this construction for the purposes of this case (R. 43).

The only issue is the determination of the date upon which petitioner's grounds for protest arose. If, as found by the Price Administrator and the court below, petitioner's grounds for protest arose on March 16, the protest was not filed within the statutory period and the Administrator's order dismissing the protest was admittedly correct.

Petitioner's main contention is that grounds for protest did not arise until the letter of May 4 restated the effect of the price schedule upon the sale in question. It has been conceded by the Price Administrator and decided by the court below that an interpretation by the Office of Price Administration resolving an ambiguous provision of a price schedule or regulation might constitute a new ground for protest. As found by the court below, however, the provisions of Revised Price Schedule No. 16 as applied to the sale to American were in no respect ambiguous. In fixing a maximum price at Philadelphia of 3.74 cents "duty paid cost and freight basis," the price schedule employed terminology universally understood in the commercial world to mean that the total cost to the purchaser, including duty and freight, might not exceed 3.74 cents per pound. The contract price of 2.65 F. A. S. Puerto Tarafa, Cuba, was the highest price permitted under the price schedule at freight rates current when the parties entered into the contract. When freight rates were thereafter increased, the price schedule clearly required that the contract

price be reduced by the amount of the freight increase.

Nor could it have been reasonably supposed that the price schedule could be circumvented and a higher price paid by virtue of the F. A. S. clause of the contract. Revised Price Schedule No. 16 prohibited sale or delivery at prices higher than those specified therein "regardless of the terms of any contract of sale or purchase, or other commitment" (R. 33) and Section 4 (a) of the Act prohibited sale or delivery in violation of any price schedule "regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into."

Petitioner being unable to point to any ambiguity in the price schedule, now urges that provisions in the price schedule requiring reduction of the contract price are unconstitutional. This contention is, however, irrelevant to the issue here presented. The belief that a price regulation may be invalid under the Act or the Constitution will not justify delay in filing a protest. Nor is there basis for petitioner's suggestion that, although a price schedule may validly impair preexisting contracts (Pet. Br. p. 15), a price schedule may not cut across contracts entered into subsequent to its issuance.

Petitioner has further urged that on March 16, the effective date of the freight rate increase, its grounds for protest had not matured because of

the contingency that the S. S. *Yildum* might never arrive and delivery of the sugar might not be made. But this contention cannot aid petitioner's case since the boat arrived and was loaded, and delivery under the contract thereby completed, on March 30, more than 60 days prior to the date the protest was filed. In addition, as was pointed out by the court below, completion of this particular sale to American was not relevant to the filing of a protest. Petitioner was engaged in the business of selling Cuban sugar for import into the United States, and the effect of the freight surcharge upon petitioner would have been the same regardless of the arrival of the S. S. *Yildum*.

Petitioner also contends, in the alternative, that new grounds for protest arose when American refused to pay petitioner in excess of the maximum price established under the price schedule. Such alleged refusal of American was not mentioned in the protest; in such circumstances, it is impossible to contend that under Section 203 (a) the protest was "based solely on" such refusal. Nor could delay in filing a protest be justified by expectation that the purchaser would pay more than the maximum price.

Equally without merit is petitioner's contention that grounds for protest had not matured on March 16 because of the possibility that Defense Supplies Corporation might absorb the increase in freight. The possibility of such alternative relief

entirely outside the scope of the Emergency Price Control Act does not excuse delay in utilizing the procedures for relief embodied in the Act. This contention is, in addition, foreclosed by the fact that the date of the alleged refusal of Defense Supplies Corporation to absorb the freight increase was not set forth in the protest and does not otherwise appear in the record.

A substantial part of petitioner's brief (pp. 14–18) is devoted to discussion of the propriety of the maximum price, and has no relevance to the question here presented.

CONCLUSION

The decision below is correct, and does not warrant further review. The petition should be denied.

Respectfully submitted.

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JANUARY 1943.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, as amended (Pub. L. 421, 729, 77th Cong., 2d Sess.) are as follows:

> SEC. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, * * *.
>
> * * * * *
>
> SEC. 203 (a). Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest

based solely on grounds arising after the expiration of such sixty days. * * *

* * * * *

SEC. 204 (a). Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * *

* * * * *

(d). Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. * * *

* * * * *

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken

pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

U. S. GOVERNMENT PRINTING OFFICE: 1943

(21)

Supreme Court of the United States

October Term, 1942

No. 596

GALBAN LOBO COMPANY, S. A.,

Petitioner,

—*v.*—

LEON HENDERSON, Price Administrator,

Respondent.

PETITIONER'S REPLY BRIEF

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Law Brief Press—NYC

TABLE OF CASES CITED

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Respondent.

PETITIONER'S REPLY BRIEF

I.

Respondent asserts that the "only issue" is the determination of the date when the grounds of protest arose. The fixing of that date by the Price Administrator involved all of the collateral questions discussed in petitioner's main brief. The Administrator was not engaged in a mere factual determination, nor in the exercise of a discretionary power. He was construing and applying the law, and his action presents questions of law involving constitutional issues.

II.

Respondent rests on the view of the Court below that there was no ambiguity in the price schedule as applied to this situation and therefore there was no need for the interpretation which petitioner sought and obtained from OPA before filing its protest.

A. Before dealing with this argument, it may be profitable to go behind it. Why should it be necessary to show an ambiguity in the price schedule in order to determine that the grounds for protest arose at a date later than March 16? Even if it had been quite apparent on that date that the WSA order would affect petitioner's contract, it does not follow that the time for filing protest then began to run.

The Statute fixes a short period of 60 days after the grounds for protest arise for initiating a proceeding (Sec. 203a). Such a provision should be reasonably construed in the light of the legislative purpose. In *United States* v. *Katz,* 271 U. S. 354 at 357 this Court said: "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

There is no compelling reason here to apply an uncertain standard to determine when grounds for protest arise. The test of ambiguity used by the Court below is itself ambiguous in application. In the administration of this far reaching law, a more certain guide should be adopted so that the average man may know when he must act.

The simple and natural guide would be the date when OPA rules on an inquiry as to the impact of the law. In this case, that date was May 4. Another simple and unequivocal guide would be the date when the controversy arises through refusal of the buyer to pay the contract price. That date here was April 9.

The decision below has discarded these sure criteria for the vague and indefinable test of whether the price schedule was ambiguous in its application to the facts in question. No man can ever be sure of the answer to such a question until the courts have told him.

It could not have been the legislative purpose to cut off the

right to protest 60 days after the mere possibility of hardship appears. Yet that was all that had developed in this case on March 16. This illustrates the unsoundness of the test adopted. The time for protest should run only after the protestant knows unequivocally what the nature of his complaint is and why he must protest.

B. Beyond this, Respondent's premise that the price schedule was unambiguous is false on two main grounds:

1. If petitioner's time to file its protest began on March 16, 1942 what would have been the form and substance of such protest on that date? A protest against the order of the War Shipping Administration would not lie to the Price Administrator. A protest to the Price Administrator against the possible prospective effect of the WSA order upon FOB or FAS contracts on which petitioner had not yet made delivery would have met with the proper response, "Don't bother the OPA with hypothetical cases; wait until the actual effect of the order is felt and then apply for relief."

No reasonable man would have understood that the WSA order required him to submit a protest on each of his open contracts for determination of the effect of that order before the performance of each had reached the stage where the effect of the order had become apparent. Certainly no reasonable man would have suspected that the short period of 60 days for protest had begun to run on March 16.

The substance of a protest filed on March 16 would have been strange indeed. It would have been necessary to say, "If the buyer lifts the sugar, and if its ship charter is such that the cost of landing the sugar in New York is greater than 3.74 per pound, and if Defense Supplies Corporation will not absorb the surcharge, will the buyer nevertheless be entitled to pay the FAS contract price?" Of course other

unanticipated expenses might raise the landed cost to more than 3.74 even though the surcharge order of WSA did not have such effect. Should such possibilities be taken into consideration in a protest prepared on March 16? The question demonstrates the futility of a protest before the facts have been determined.

Obviously on March 16, the effect of the WSA order was not clear enough to warrant much less require a protest. It follows that the 60 day period of limitations should not be held to run from that date.

2. The "ambiguity" test was in any event improperly applied in this case. The Court below granted that a ruling by OPA might constitute "new grounds" for protest if the provision in question were ambiguous; but held that the ruling of May 4 was not such "new grounds" because there was no ambiguity here.

What test of ambiguity shall be applied? The Court below looked at the words of the Price Schedule and concluded that they plainly required that the contract price be reduced by the amount of the freight surcharge. Respondent (p. 5) employs the same test.

A business man, however, as of March 16 would not have regarded the matter as clear. He would see that such an application of the words of the Price Schedule would leave his contracts subject to all kinds of unknown hazards. Any increased cost of transportation would come back on the seller. FOB and FAS contracts were not prohibited by the Price Schedule. They were common trade practice. And yet they would not be effective commitments if the Price Schedule required the reduction of the FAS price by the amount of the freight surcharge.

It was not essential from the wording of the Price Schedule that such effect be given the WSA order. Outstanding con-

tracts made in reliance upon preexisting rates could be maintained. As of March 16 there was no reason for a layman to assume that such would not be the interpretation of the Price Schedule.

Even from a lawyer's point of view the same is true. Invalidation of existing contracts by the indirect effect upon the ceiling price of an order of a government agency other than OPA presents serious legal questions. It might well be expected that the Price Administrator would so construe the Price Schedule as to avoid such questions.

If, as Respondent says (pp. 5, 6), the Price Schedule "clearly required that the contract price be reduced by the amount of the freight increase", a lawyer might be excused for questioning the validity of the Price Schedule itself. An administrative agency may not thus generally nullify contract commitments made in reliance upon existing administrative rules and regulations. Due process still has some meaning, and the war does not yet justify an edict by OPA that no FAS contract for the sale of sugar is a binding obligation of the buyer if transportation costs are increased before delivery.

OPA did not fix the cost of raw sugar to the refiner's door. It could not have done so with propriety. It may not accomplish that objective by indirection.

In the light of these considerations the contention that the Price Schedule was unambiguous is fallacious. Respondent's statement that petitioner is "unable to point to any ambiguity in the price schedule" (p. 6) is without merit.

III.

Respondent argues that various factors did not justify delay in filing protest, insinuating that petitioner's case is based upon a plea to be excused for tardy filing (see pp. 6, 7 and 8).

The suggestion is unwarranted. Petitioner's argument has not sought to excuse a delay in filing the protest but to demonstrate that the grounds for protest did not arise until the OPA issued its ruling on May 4, or in any event not before the buyer refused to pay the contract price on April 9. In either case the protest was timely and there was no necessity for excuse.

IV.

Respondent's argument that the FAS clause "circumvents" the Price Schedule (p. 6) is specious. Neither the Price Administrator nor the Court below has gone so far as to claim that FAS and FOB contracts are necessarily prohibited by the terms of the Price Schedule. If such contracts were not prohibited, then any such sale at the ceiling price prevailing on the date of the contract was in conformity with the law and regulations. It begs the question to argue that because such a commitment may run counter to a later ruling it was therefore circumventive in character when made.

V.

The Price Administrator's position has been based upon a legalistic interpretation of the term "grounds" for protest. There is no call for such technicalities in the administration of the law. Yet two more technicalities are argued in Respondent's brief.

A. It is argued (p. 7) that the refusal of the buyer to pay the contract price may not be presented as new grounds for protest because such refusal was not mentioned in the protest, and therefore the protest was not "based solely on" such refusal.

Section 203 (a) does not require that the protest be based solely on grounds stated therein. The words "based solely

on" refer to the time when a protest must be filed when it is "based solely on grounds arising after the expiration of such sixty days."

Protests must state "all objections" (Procedural Regulation No. 1, Sec. 1300.29 (c)). But there is no requirement that the "sole grounds" of protest be set forth.

In this case while the protest did not specify the date of the buyer's refusal to pay the contract price, the time was clear from the facts given (Tr. 5). While petitioner urged that the grounds for protest arose on May 4 when OPA issued its ruling, it is proper and permissible to argue in the alternative that the grounds for protest in no event antedated the refusal of the buyer to pay the contract price. The sole date relied upon does not have to be stated in the protest.

B. Respondent argues that the possibility of absorption of the freight surcharge by Defense Supplies Corporation may not be considered as a factor in the picture as it appeared on March 16 because the date of the refusal of Defense Supplies Corporation to do so was not set forth in the protest and does not otherwise appear in the record (p. 8).

The protest did show that application was made to Defense Supplies Corporation for such relief (Tr. 5). The joint letter of buyer and seller to OPA dated April 22 showed that such application had been made and denied (Tr. 21, 22). The complaint in the Court below alleged the facts in paragraph 5(f) (Tr. 3); and the allegations were admitted in paragraph 2 of the answer (Tr. 9).

It is apparent that the application to Defense Supplies Corporation was made and denied before April 22; and it could not have been made earlier than the buyer's refusal to pay the contract price. This again could not have occurred until after April 4, the date when the boat sailed (Tr. 5).

These facts are therefore available in support of Petitioner's argument that as of March 16 there was no certainty that the WSA order would affect this contract and therefore no basis for protest.

VI.

The right to a hearing on the merits by an administrative tribunal should be jealously safeguarded. The ruling of May 4th by OPA is no substitute for such hearing. It cannot be assumed that after full consideration of the facts, the Price Administrator would reach the same conclusion. This Court has so held in a recent decision involving a Labor Board case. In *National Labor Relations Board* v. *Indiana & Michigan Electric Company,* decided January 18, 1943, in holding that certain evidence should have been considered which the Board deemed irrelevant, the Court said: "We will not assume in the circumstances of this case that the Board will in any event refuse to modify its conclusions."

Petitioner should not have been denied consideration of the merits of its protest. The application of the statute of limitations on the grounds given here establishes a dangerous and unwholesome precedent. It permits an administrative agency so to construe the law in its application to its own regulations as to foreclose the vigilant as well as the unwary from a hearing on the merits, even though the normal course of inquiry has been followed.

This is neither the appropriate nor the sensible approach to problems of statutory construction and administration of the law. In the name of equity and sound government the writ of certiorari should be granted to review the judgment of the Court below.

Dated: New York, N. Y.,
January 25, 1943.

Respectfully submitted,

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